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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 27.

THE HELENA WATER WORKS CO., APPELLANT,

vs.

THE CITY OF HELENA.

SUPPLEMENTAL BRIEF OF APPELLEE.

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Commencing on page 47 of appellant's brief, it is contended that under subdivision 64 of section 4800 of the Political Code of Montana, as amended in 1897, the city is precluded from acquiring a water plant and supply other than of appellant. Said subdivision is set forth at length on page 5 of appellant's brief, the particular proviso upon which the appellant relies commencing at the bottom of page 5 and ending on page 26.

But this proviso is practically and almost identically a re-enactment of said subdivision 64 of section 4800 of the Montana Codes of 1895, and which was declared unconstitutional by the supreme court of Montana in the case of Helena Consolidated Water Company *vs.* Steele, 20 Mont., 1.

The opinion in that case is made a part of the agreed statement of facts (paragraph 7, Record, 48) and is set forth

in full, commencing on page 117 of the record, while the pleadings, etc. (also by paragraph 7 of the agreed statement made a part thereof), are found on pages 52 to 77 and 117 to 128 of the record.

Having already discussed this case at length as being *res adjudicata*, we deem it unnecessary to pursue the particular feature, suggested in appellant's brief, further than to barely call the attention of the court to the facts mentioned, which speak for themselves.

It must be conceded that every contract when reduced to writing will be interpreted by the language used, unless at least it would lead to unreasonable and unjust results. For the purpose, then, of arriving at a correct interpretation of ordinance 248, upon the theory asserted by appellant, we shall assume that it is in the nature of a contract throughout, and eliminate from it entirely all of the attributes that would otherwise attach on account of the franchise granted and the corresponding duties arising from it. It must be noted, however, that we by no means concede as matter of law that under the rule applicable to such franchises, when under the constitution and express terms of the franchise no exclusive rights are granted to maintain water works or plant, any implied obligation is raised by which the granting power obligates itself to purchase water and thereby becomes estopped from establishing its own works or plant during the existence of the franchise. No lawyer can doubt for a moment that an ordinance, or contract as it is termed, cannot not be so framed and drawn as to obligate the grantee in the franchise, in consideration of the privilege granted, to furnish and supply the grantor with water for a particular period and at a specified rate, and at the same time reserve

to the grantor the right to purchase water or not, or procure it in any other lawful manner. We shall, therefore, assuming the right to contract in this manner to be a legal one, and that the grant of the rights and privileges is a good consideration for the obligation stated, endeavor to show to the court that this is exactly what has been accomplished by ordinance 248; and we shall assume, also, for the purposes of this argument, that the authorities cited by appellant in its original brief, tending to show that where there is an obligation imposed by ordinance or contract to furnish water, there is a corresponding obligation to purchase it, and that the grantee of the franchise is estopped from putting in a competing plant of its own—that is to say, by section 1 the grant was for twenty years. That by section 6 there is no limitation as to the duties and liabilities; that other sections provide for connections with the pipes to be made, that maximum rates are to be established, and that all these under section 26 are to exist for the full period of the franchise. We would then *perhaps* have a case, under some of the authorities cited, where the implied obligation relied upon would obtain. But suppose there is an express provision in the ordinance or contract that in addition to the provision in the franchise it shall not be exclusive, there is also a provision that no obligation whatever is imposed upon the grantee to take or pay for the water contracted to be furnished and supplied by the grantee of the franchise, will it be claimed that an implied obligation arises in the face of it to purchase the water, and, if not, that it is of any concern to the grantee from whence or how the grantor obtains its supply so long as it does not interfere with the franchise granted? We shall assume, as suggested

by counsel in their supplemental brief, that the transaction came up as it did, by a proposition from the grantee of the franchise to furnish and supply the city and its inhabitants with water for a period of twenty years; that it would put in suitable works for the purpose; allow all suitable connections with them, and furnish and supply good and wholesome water during the whole period of the franchise at a fixed rate. If the proposition was accepted according to appellee's theory, there is an implied obligation on the part of the grantor of the franchise to take and purchase the water during the twenty years, and that on account of such *status* it is estopped from establishing its own plant. Conceding this barely for the purposes of the argument, what is to be said if the city does not accept it and insists upon inserting a clause to the effect that it will not obligate itself or the inhabitants to take or pay for its water unless they desire to do so? Is not the whole proposition as to that matter thereby converted into an option? Will an absolute obligation be inferred in the very face of this provision? Will the court utterly ignore the express contract of the parties and substitute one directly adverse to it? The statute of the State of Montana, for the construction of this ordinance or contract, section 3134, reads: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted; and when there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Now it will, of course, be observed that this provision refers especially to the obligation of the grantee, makes it optional, that no others conflict with it,

but refer to the obligation or duty of the grantee in the franchise.

In all reason the express provision must be given full force and effect, and no inference must be had that will impair or defeat it. The rule is too familiar and well established to be questioned that no implication will arise which is in conflict with an express provision both reasonable and just in their terms. Besides, it is axiomatic that where rights are declared or reserved everything that is necessary and incident to their enjoyment is implied and inferred. The necessity for a supply of water cannot be denied; that appellee has the only source of supply is conceded. No exclusive rights are granted. The inference, therefore, clearly is that appellant can bring in a supply of its own, in the exercise of the right reserved, and appellee has no cause of complaint. To say that appellant reserved the right not to take or pay for the water, and yet it is to be inferred that it would take it or perish, is absurd and contradictory. The only reasonable inference under the reservations is that it would obtain a supply in any lawful way. It must be borne in mind that this express provision concerning the application of the city to take the water, in connection with the other express provisions that the right to furnish and supply the water is not exclusive, is peculiar to ordinance 248, rendering all of the decisions cited, according to our view, inapplicable upon that point.

Assuming, then, that the city has the right to contract for a supply of water, not only for municipal purposes but also for its inhabitants, the following will perhaps more fully amplify our views upon this subject:

Suppose that A is the owner of a large farm, and has a large

number of employees for whom he has a right to contract for provisions for their support. He leases a portion of the farm to B for the purpose of raising grain upon it, reserving all the unleased portion to himself, as the city here does concerning the streets, nothing being said in either case that the lessee does not intend to cultivate or utilize the unleased portions himself or confine himself to leasing the same to others. The terms of the lease are that he will allow B to occupy the land leased and cultivate and raise grain thereon for the term of twenty years, upon the condition that B will raise a good and wholesome quality, suitable for the consumption of the lessor and his employees, and that he will sell it to him and to his employees during such period at a fixed or given rate, provided A and his employees *desire* to purchase the same. Could it be claimed that under this condition A could not raise his own crop of grain and furnish his own employees? Yet the affirmative of this is precisely the condition claimed and insisted upon by appellant.

As we have heretofore shown by the original brief in this case, under the constitution and laws of the State of Montana, no exclusive privilege could be granted to appellant. Under its laws the city of Helena was empowered to bring in its own water plant to supply the city for municipal purposes and the inhabitants thereof with water, and the right of eminent domain was expressly conferred for that purpose.

Whether its right could be ceded away by contract at all, much less by implication, might present a very serious question, but to assume that when the very face of such contract—when its terms expressly declare that no exclusive privilege is granted, and any and all obligation to take or purchase water from appellant is expressly guarded against,

that such right is ceded away by implication presents a monstrous proposition under an irrational rule of construction.

It is manifest that the contrary was intended and that the city has retained and preserved, and intended to retain and preserve, the rights conferred, and that it should be permitted to exercise them, which it is now seeking to do.

Whatever may have been the result of the interpretation of franchises of other cities, there is no room under ordinance 248 to infer that the city of Helena has in any manner obligated itself to take water of appellee for any purpose, and consequently has the right to procure it in any lawful way.

Construed under the Statute.

We now especially invite the consideration of the court to the construction of the ordinance or contract under the rule declared and established under the statutes of the State of Montana. While we are irresistibly forced to the conclusion heretofore expressed, the method of reaching it is more direct and immediate. Preliminary to the analysis we propose to make, we will again restate the premise upon which it will be predicated. There are four provisions of the ordinance or contract which are alone material or pertinent to the determination of the main and controlling question under this branch of the case. If we are correct in the position that, under the terms of the ordinance or contract, the city has not obligated itself not to install its own water works or plant during the twenty years' franchise, it logically and necessarily follows that appellant has no cause of com-

plaint, and the decision of the circuit court of appeals should be sustained.

It is quite apparent that, when ordinance 248 was adopted, the four prominent and material matters bearing upon the question in hand were as follows:

First. That no exclusive privilege to establish and maintain the water works or plant or the right to furnish and supply the city and its inhabitants with water should be granted.

Second. That no obligation of any kind should be imposed upon the city to take water from said works or plant, but it should be entirely at its option to do so.

Third. That nothing therein contained should "preclude the city from constructing or maintaining sewer works or other works or plants of a public nature," or from granting such right to any person or corporation whatsoever.

Fourth. That the water to be furnished under the option to take in consideration of the franchise granted must be of a pure and wholesome character.

These are the only provisions of the ordinance or contract that are at all applicable to the question in hand, and are contained in sections 1, 3, 6, and 26, and we believe we have stated the substance of them correctly.

It might also be added that in connection with the provisions of section 3, authorizing the construction of works and plants of a public nature, section 5 provides, "nor shall such pipes or mains interfere or obstruct any sewer now in

said street, nor shall there be any interference with *mains, pipes,* or *sewers* which may be hereafter authorized to be laid or constructed, by or under the authority of said city of Helena, * * *." Thereby showing that such water works or plant was contemplated by the parties.

In the outset it must be observed that the language or phrase used and *inserted* in section 3 is that nothing herein contained shall preclude the city from constructing or maintaining " works or plants of a public nature." It is not even limited to public works or plants, but extends to all works or plants of a public nature. To cite the court to decisions or precedents that a city's street car plant, its light and power works and plant, its sewer works and plant, and water works and plant are not all included in the words or phrase, " works or plants of a public nature," would be vain and idle, if not indeed offensive to the rules of propriety. Hence it must be conceded that by an express provision of the ordinance or contract the right to construct and maintain water works and plants is expressly preserved.

Now, as we have seen by the section of the statute heretofore quoted, the court cannot omit that which is inserted or insert that which is omitted. So that the reservation of the right to construct and maintain its own water works or plant cannot be eliminated.

Section 2202, Code of Civil Procedure, declares: " For the purpose of ascertaining the intention of the parties to a contract, *if otherwise doubtful*, the rules given in this chapter are to be applied." Section 2203 reads: ' The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." 2206. " The whole of a contract must be taken together so

as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." We know that the works or plants of a city of a public nature include its water works or plant, and section 2209 reads: "The words of a contract are to be understood in their ordinary and popular sense * * *." The astute American has learned from his infancy that the public works and plants of a city include its water supply, and that when the works and plants of a city of a public nature are referred to, that its water system and supply are intended and designated. Sec. 2217 says: "Repugnancy in a contract must be reconciled, if possible * * *." Where is there any repugnancy here? There certainly is no express provision repugnant to this reservation, and the best-considered authorities show that there is no implied obligation not to construct and maintain its own water works, even in the absence of premises 1, 2, 3, and 4, heretofore stated. What, then, shall be said under the particular ordinance or contract when it expressly provides that the company's right to lay its pipes and furnish water to the city, for itself and its inhabitants, shall not be exclusive; that the city shall not be obligated to take its water unless it desires, thereby creating a bare option, and that it shall not be precluded from constructing and maintaining any works of a public nature? With the two former premises the latter would be implied, but the parties have seen proper to express it. There is no possible way of avoiding the results reached unless we create a repugnancy by implication, and then allow it to overcome and defeat the express provision, which cannot be tolerated under any rule of construction.

Are we to assume that the words there used are wholly

inconsistent with the main intention of the parties when they do not lead to absurdities, but are in accord with just and reasonable objects and purposes? It is not in consonance with a sound and good judgment that a city in dealing with public rights, to be maintained by the exercise of eminent domain, which can attach alone to such rights, should retain the privilege of putting in its own water works and plant, in consideration of granting a twenty years' use of the streets and *privilege* of selling water to the city or its inhabitants? There is neither reason nor justice in interpolating into this ordinance or contract an implied obligation not to construct and maintain its own works and plant at any time it may deem it expedient to do so during the twenty years' franchise.

By inserting the provision that no exclusive right to the use of the streets or to furnish the city or its inhabitants with water it rebutted any such implication. By inserting the express provision that it should not be required to take water for such purpose it absolved itself from all obligation to refrain from obtaining water in any lawful manner, and repelled any such implication, and by *expressly* providing that nothing therein contained should preclude the city from constructing and maintaining its own works and plants of a public nature it excluded the possibility of such implication. The claim of the company and upon which it must recover, that such implied obligation exists, is fairly negatived by those provisions of the ordinance or contract. It is by its option and reservations absolved from any and all obligations, legal, moral, or equitable, not to exercise the right to install its own water plant which is conferred upon it by law. The claim of appellant is imagination and not

founded in law or reason, if effect is to be given to the express provisions of the ordinance and contract and the provisions of the statute for the construction of it. The reserved right not to take the water unless it desired to, being in express terms, was in the minds of the contracting parties, and carried with it all the incidents necessary for its enjoyment, paramount among which is the right to install its own works and plant. The argument is that if no exclusive privilege is granted and *no* obligation to take the water is incurred, and these things were in the minds of the parties at the time, it fortifies the conclusion that the intention was to do just what is provided for—*i. e.*, permit the city to construct and maintain its own water works or plant. Indeed, this would be the result without the latter provision. The emphatic conclusion of all this is that it is no business of the appellant how the city of Helena obtains its water supply so that it is done in a lawful and legitimate manner.

The right to construct and maintain water works and plants by a city to supply itself and its inhabitants with water is a public right and public use expressly conferred upon incorporated cities of the State of Montana, and the right to the exercise of eminent domain is given for that purpose. It is a legitimate exercise of legislative authority in declaring what is a public use. When this power to construct and maintain water works and plants of its own is conferred upon a city, and it is claimed that these rights are surrendered or ceded away, assuming that it could be done at all, the language employed to effect that object should admit of no other rational construction. Here no such language is used, and no such necessary and unavoidable intendment obtains. On the contrary, the inference is that

under ordinance 248 this right was intended to be and has been retained and preserved under the canon of interpretation in such cases.

The high estimate we entertain for counsel asserting that water works or plants of this character are not of a public nature precludes the questioning of their sincerity, yet we nevertheless insist that they are laboring under a great and flagrant error.

And it must be borne in mind that the exercising of this very right to construct and maintain such works is expressly reserved. While we insist that the contractual obligation under a proper construction of ordinance 248 is limited to five years, yet it is manifest from what has been said that it is not material and does not change the legitimate conclusions arrived at by assuming the company's construction to be correct, of extending it to the full period of 20 years, as claimed by it. The conclusion of the appellee is that the power being conferred upon the city to construct and maintain its own works and plants, it is done in the interest of the public, and that in any contract or transaction it will not be presumed to have surrendered it, if it could do so, unless it expressly or by necessary and unavoidable implication has done so; that the intention to bind after councils for so long a period must admit of no doubt, if it can be done at all.

The appellant suggests that it was an easy matter to have expressly reserved this right. When the clause was inserted in the ordinance expressly providing that appellant should not be precluded from constructing and maintaining works and plants of a public nature, this was the time for appel-

lant to have made the suggestion it now makes, if it did not understand what was meant by the language used.

The doctrine seems to be universal that the supplying of water to the inhabitants of a city or town is, as we have seen, clearly a public purpose, to accomplish which the legislature may confer upon a city * * * the right to condemn private property, as will appear by reference to 29 A. & E. Encyc. of Law, p. 4, and authorities cited under note 4, and Rogers *vs.* Burlington, 3 Wall., 654. City water works and plants has a well-known meaning, and, under the law of which all must take notice, is of a public nature. The right to construct and maintain works and plants of a public nature comprises water works or plants. It is a power and discretion conferred upon the city for the public welfare, and possesses the attributes of sanitary and police measures and ought not to be impaired unless necessarily and irresistibly implied. It is a discretion and public trust reposed in the city for reasons too important to the beneficiaries to be encroached unless the rules of construction impel the court to do so. The public, when applied to an incorporated city, refers to its inhabitants. They are the beneficiaries, and the works and plant is expressly for their benefit. The language used in section 3 of the ordinance or contract is: " Nothing contained herein shall preclude said city of Helena * * * from the construction or maintenance of sewer or *other works* or *plants* of a public nature; " and it is now too late to object to giving full force and effect to the language used. It has often been held that authority to construct public works generally authorized the construction of water works and plants by an incorporated city, empowered it to construct and maintain water works.

In all reason the doctrine applies with greater force where the power to construct and maintain water works and plants is expressly conferred, and the question becomes one of limiting such power. More scope should therefore, if anything, be given to a reservation of such power, and a provision that the ordinance should not preclude the city from constructing and maintaining works or plants of a public nature should likewise be construed to include water works or plants. Especially is this so when the franchise is not exclusive and by express terms the grantor has absolved itself from all obligation to take water of the grantee.

We assert with unreserved confidence that the reservation of the right to construct and maintain works and plants of a public nature includes water works and plants, and absolutely repels any implication inconsistent or in conflict with it. The reason is the same where it is a question of conferring powers or reserving them, and the maxim is "*Ubi eadem ratio, ubi idem jus.*"

The reservation of the right to construct and maintain water works and plants carries with it the incident of its use and to sell it to the inhabitants who, as we have seen, are under no obligation to purchase of the company. If this principal thing is subordinated to its incident, and the right to make it available is taken away by inhibiting its use and sale, the grant or reservation of the main thing is destroyed. The maxim is: "*Accessorium non ducet sed sequitur suum principale.*"

Water works and plants are comprised in a grant of general powers to construct and maintain public works, and no reason can be assigned why it should not be included in a reservation of powers already granted. Indeed the reason

for the application of this rule is greater and stronger in the latter, when applied to matters in which the public interest is involved, and future councils are to be bound.

Rogers *vs.* Burlington, 3 Wall., 654, 662.
29 A. & E. Enc. of Law, p. 4 and authorities in note 4.
Matter of Public Works, 13 Fla., 699.

Many decisions might be cited to show that power conferred upon a city to make improvements for the public welfare includes water works and plants because of a public nature, and the reservation of the right to construct works of a public nature must necessarily therefore preserve the right then possessed—*i. e.*, the right to construct and maintain its own water works and plant. Public *works*, when applied to a city, *especially* apply to water works, and the adaptability and application of that fact is shown by the name appellee adopted for its company.

We insist that with the constitutional and statutory provisions against granting any exclusive privileges, in connection with the power conferred upon appellant to construct its own water works, with the right of eminent domain for that purpose, no rule of construction will admit any implication that will deprive it of such rights; and especially do we insist that when the ordinance itself expressly provides that no exclusive rights or privileges to furnish the city or its inhabitants is granted, and all obligation to take or pay for the water is *expressly negatived*, to hold that there is an implied obligation to take and pay for the water, which alone can defeat the right to install its own plant, would be a perversion of justice, utterly defeat the manifest intention of the

parties, and finds no support under any reasonable rule of construction.

When the proposition was made for a franchise and the city insisted upon and obtained in the ceding clauses of the ordinance provisions that the rights granted should not be exclusive, that it would in no way obligate itself to take or pay for the water to be furnished, and thereby limited it to a bare option or privilege to do so, it reserved to itself the right to install its own plant, conferred upon it by law, in too plain and unmistakable terms to be frittered away by judicial construction, could it even be deprived of such right by inference or implication. Indeed, it must be said that the implication is just the reverse of that claimed by appellant.

Recapitulation.

What is there, then, peculiar to the ordinance or contract before the court that rebuts the implication claimed by appellant, that the city has obligated itself not to construct and maintain a water plant during the entire duration of the franchise? Assuming that the obligation to furnish the water as claimed extends for twenty years, why does not the obligation of the city not to bring in and maintain works of its own not obtain under the particular provisions of the ordinance and contract during that period? The reason is that there are three *express* provisions therein contained which are inconsistent with such implied obligation. In other words, no such implied obligation can arise in the face of these provisions:

First. It is *expressly* provided that no exclusive privilege of furnishing the city or its inhabitants with water is granted. The parties, in significant language, thereby secure to the inhabitants full and complete competition by any lawful competitor.

Second. They *expressly* agree that neither the city nor its inhabitants shall take water unless they desire to do so. By this it is shown that the real, as distinguished from an implied, intention was to relieve the city of any and all legal, equitable, or moral obligation to take the water and create a bare option, showing that the parties had in mind the intention that no obligation in that respect was to be inferred.

Third. That in furtherance of these ideas and suggestions, it is also *expressly* agreed that nothing contained in this ordinance or contract shall be construed as precluding said city from constructing and maintaining any *works* or *plants* of a public nature. This must mean that it reserves the rights which have been conferred upon it in that respect, or it means nothing.

When a city reserves the right to construct and maintain *works* and *plants* of a public nature, it reserves the right to construct and maintain those works and plants of that nature which have been conferred upon it. To ascertain what they are we recur to section 4800 of the Political Code, subdivision 64, and find that water works, sewer plants, and lighting plants are the *works* and *plants* of a public nature which the city is authorized to construct and maintain. Indeed, if this were not so, our knowledge and conception of

the terms used would convey the idea thus expressed in the code. Being, therefore, in the nature of a reservation, the mind naturally recurs to the power conferred. In doing this the intention to reserve this power conferred is apparent and manifest, and no implication is fair or just that takes it away or destroys its effect. We must construe it to mean the works and plants, the power to construct and maintain which is conferred to give the reservation any effect. To destroy its effect by not so construing it is contrary to all rules of interpretation. To give appellee any standing whatever under the ordinance or contract, it must be necessarily implied that under these conditions the city has obligated itself not to construct and maintain such works or plants, which is absurd and contradictory. The unique inferences by which appellant seeks to overcome these prominent and forcible expressions in the ordinance or contract scarcely admit of serious consideration. Especially is this so when these powers to construct such works and plants are conferred upon the city as a part of its police powers and confessedly for its welfare. The same reasons for the conferment of the power pertain to its reservation. In all reason, language that would confer upon a city power to construct and maintain a water plant would operate to retain it when used in a reserving clause.

It must follow that if the power to construct and maintain works and plants of a public nature confers the power to construct and maintain water works, and no one contends that it does not, a reservation in similar language must operate to retain such power, and, if so, it is decisive of the merits of this contention. It must therefore be said that this implied reservation under the many authorities we

have cited has been crystallized in this instance into an *express* reservation, and no implications inconsistent with it can be indulged. When a reservation of this kind is inserted in an ordinance or contract, three suggestions necessarily, instantly, and directly recur to the mind: First, water works; second, sewer plant; third, lighting plant. With these in mind, then and there was the time to have objected, and it is too late now, after the contract is completed and one of the parties is seeking to avail itself of a reservation or condition made for its benefit.

When a city makes a contract with an individual or corporation it is perhaps true, as claimed, that it involves no governmental or legislative function. But when a city undertakes to construct and maintain water works for itself and inhabitants it must do so under its powers of a public nature, and it is this power that is sought to be preserved by section 3 of the ordinance or contract, and the question is, what is meant by such reservation in the connection in which it is used, in whatever capacity the city may be said to contract. If the *phrase used* was between individuals the question would simply be, are the works sought to be installed of a public nature. When construed in connection with a city putting in water works for the city and its inhabitants it undoubtedly is. If A has a right to contract with B that he will not engage in certain enterprises, but reserves the right to make and carry out contracts of a public nature, could he not contract with a city that was constructing its own water works for the city and its inhabitants? This clearly illustrates that the character in which the parties contract is of no consequence, and that the subject-matter of the contract is the material and

controlling attribute. If there were express provisions in the Joplin case in the lower court, or any of the other cases cited by appellant, first, that no exclusive privilege is granted; second, that no obligation of *any kind* to take the water is incurred; third, that the right to put in *works* or plants of a public nature by the city for it and its inhabitants is reserved, anything herein to the contrary notwithstanding, can it be said that the court would have reached the conclusion that there was an implied contract on the part of the city not to put in works to supply the city and its inhabitants with water? The appellant is asking the court to disregard its contract and make one more favorable to it, while the city is now seeking to avail itself of the express reservation, and the court is asked to prohibit it from doing so.

One of the principal reasons given by Judge Phillips in the Joplin case in reaching his conclusion is that the right, either to construct a lighting plant of its own or permit others to do so, precluded the idea that it could do both, and that by adopting the latter it had exhausted its powers. Here it is conceded that the power to do both exists, and that duplicate water works might be installed. It is entirely consistent with good judgment and reason, therefore, that the city, notwithstanding the reservation of the right to bring in works of its own, should at the same time require the company, so long as it occupies the streets, to furnish water at a certain pressure and of a certain quality for the inhabitants. Common prudence would suggest this course, so that, in case one was for any cause unavailable, reliance could be had upon the other works, besides affording to the inhabitants competition in furnishing water. Assuming, as

claimed, that the obligation or duty of appellant extends for twenty years instead of five, this is just what the city has done, and it is as equally applicable in the one case as the other. It has no reference to and in no way affects or qualifies the reservation. And so it is as to whether the obligation of the company arises out of a duty or contract, the reservation is appropriate in either event. It is not disputed that the city had the power to install another water works, but it is claimed that, in so far as the inhabitants are concerned, there is an implied obligation on its part that it will not do so. We are unable to appreciate or comprehend this distinction. The power to contract for water works or install them for the benefit of its inhabitants is not an agency or delegated authority by the inhabitants. It resides in the city on account of its police powers, is an entirety, and exercised for the welfare of its inhabitants as a part of the municipality in providing for their health, safety, and convenience. It is the exercise of the general power that is exercised in providing a system of sewerage, providing and keeping in repair streets and sidewalks and the like. The power to contract for water works for the city is a common power, from which source it supplies itself and its inhabitants, and this attempted distinction that it could grant a franchise to others, but cannot supply the water itself, is not supported by reason, and the maxim is, " Where the reason of the rule ceases, so should the rule itself," and " When the reason is the same, the rule should be the same."

But in the case in hand the rule and the reason are the same. The very identical language in the reservation that retains the right to grant a franchise to others to furnish the inhabitants secures the very same right to the city. The

language of section 3 of the ordinance or contract is: "Nothing contained herein shall preclude said City of Helena. * * * from the construction or maintenance of sewer works or works or plants of a public nature, or from letting, giving or granting any franchise rights or easements to any person or persons, or corporation or corporations whatsoever * * * ." Indeed it might be said that the reservation in favor of the city to construct and maintain any works or plants of a public nature emphatically forbids the implication that it will not put in water works for itself and its inhabitants, if such works are to be regarded as of a public nature.

Lewis on Eminent Domain, 2d edition, section 173, says: "The condemnation of property for supplying a city or town with water is so manifestly a public use, that it has seldom been questioned and never denied," and cites numerous cases in support of the text. Assuming that the same scope and meaning will be given the reserving clause as is given the statute conferring the power, and that the same rule in determining what are works and plants of a public nature, and that such works and plants comprise water works, we quote section 1 of "An act entitled An act to enable certain cities and towns to incur indebtedness" (approved September 14, 1887); it reads:

"SECTION 1. That any incorporated city or town in the Territory of Montana having an assessed valuation of twelve hundred thousand dollars or over, is hereby authorized to submit to the qualified electors of such city or town the question whether coupon bonds shall be issued on the credit of such city or town to an amount not exceeding two (2) per cent. of its assessed valuation, for the purpose of constructing

water works, public buildings, street grades, bridges, sewers, or other public improvements."

This act was afterwards amended so as to allow 4 instead of 2 per cent., on February 28, 1889; and so it will be seen that under the law water works are public works and must be so regarded under the reservation.

The city undoubtedly has control of its streets, alleys, and public grounds, the use of which is absolutely necessary in securing a water supply for the welfare of its inhabitants, and the exercise of such power is the exercise of governmental functions and duties, which ought not to be surrendered, if it could possibly be surrendered by implication. We confidently insist, however, that under the ordinance or contract in question there is not the slightest room for the implied obligation contended for by appellant. As we have seen, the power to construct and maintain water works for the city and its inhabitants is expressly conferred by statute, and the reservation is in keeping with many decisions; that it cannot be ceded away. The city is the judge of what is necessary for the welfare of its inhabitants, and the right and duty to provide for their security, health, and safety ought not be taken away by implication when any other construction is at all possible. We have endeavored to present this important branch of the case, in all of its various phases, to the best of our ability, and aid the court as much as possible in getting at the real merits of this contention in construing the ordinance and contract under the reservation contained in it, and wish to tender any apology the court may deem proper on account of its prolixity.

Again, it is claimed that the provisions of the statute for raising the funds necessary to the exercise of the power thus

conferred is in violation of article 13, section 6, of the constitution of the State.

Aside from presenting a proposition impracticable and absurd within itself in assuming that the revenue must be forthcoming before the completion of the works from which it is to be derived, the vice of the argument is apparent at a bare glance at the provision of the constitution. It simply and plainly intends to provide, and does provide, for the source of revenue for the indebtedness authorized to be incurred in the construction of the water works. The constitutional provision is quoted on page 4 of appellant's brief, to which we refer. If the "revenues derived therefrom" were devoted to a different purpose, then, and not until then, would any cause of complaint arise and the gravamen of the suit would be to prevent a misapplication of the appropriated fund.

Besides, it is claimed that some of the proceedings taken in the construction of the water works are not in accordance with the mode pointed out and required by the statute. Besides being obnoxious to the objection that under the agreed state of facts the city proposes and intends to comply with the provisions of the constitution and statutes in constructing and maintaining the water works, there is another reason that renders this claim absolutely untenable, if not frivolous. The object of this suit and the decree rendered by the United States circuit court of Montana absolutely prohibited the city from constructing a plant to supply the inhabitants thereof with water, and we know of no rule of law or principle of justice that works a forfeiture of *these rights* on account of a mistake in the pursuit of some of the methods pointed out by the statute. If the course pursued

is improper, the suit should have been leveled at the improper method adopted and would be confined to that, and an opportunity to correct it would then be afforded. No such question is proper here, and, if it was, the decree of the United States circuit court of Montana should apply only to the illegal steps taken and not have enjoined appellant from installing its plant for the purpose contemplated. As it was, the city was enjoined from bringing in a supply of water until after the expiration of the company's franchise, at the end of which term the old works may be entirely worthless and the inhabitants left for years without a water supply, and the city censurable for failing to provide for their welfare. In connection with this important branch of this case concerning the scope of the decree, it does not seem out of place to suggest that the record shows that the water works of appellant were constructed in 1890; that they have lived out to a great extent the ordinary life of such plants; that by means of riders through legislation the company has greatly hampered the rights of the city; that by the litigation shown by the record it has seriously embarrassed every move made by the city to secure a water supply of its own, and that if this city is now enjoined until after the franchise of appellee has expired it may then find that it will be again impeded by harassing litigation and the inhabitants probably left for many years without a water supply. This matter is important and serious, and we respectfully invite the consideration of the court to it.

In this connection we might add that we have been utterly unable to comprehend why the trial court enjoined the city from putting in its plant so as to be prepared to furnish water at the expiration of the franchise under any

phase of this case. Manifestly the city, in the exercise of its discretionary powers, has concluded that the works of the company are but short-lived, and anticipating the necessity, as a sanitary measure, of being prepared to furnish the inhabitants with water, together with the fact that it can be more cheaply done in connection with bringing in the water for municipal purposes, has deemed it advisable to put in its works at this time. We invite the court's attention to the bill of exceptions on this point, contained on pages 130 and 131 of the record.

How different in the case in hand. It is conceded that the city under its *powers* can, notwithstanding it has granted the franchise to appellant, nevertheless construct and maintain water works of its own, but that, on account of the *obligation* of the company to furnish water at a given pressure and of a certain quality for twenty years, there is an implied obligation that the city will not compete in the water business during that period. This cannot be so if the city has paid for its option to take water for itself and its inhabitants. If this obligation to keep up a water supply does not grow out of the franchise and privileges granted, it has no consideration whatever to support it. If based upon the theory that it is an obligation arising out of the option, there would be no consideration to support it and an utter want of mutuality, as it would depend entirely upon the wish and will of the city and its inhabitants. This is well illustrated in Cold Blast, &c., *vs.* City, &c., 114 Fed., 77, 81 (C. C. of A.). If the franchise, therefore, furnishes the consideration for the option, it cannot be said that any obligation is incurred by the city on account of it. The option follows and adheres to the appellant's obligation to furnish

the supply of water and is no part of the consideration for it. It is for the benefit of the city, and it has paid for it by the franchise. Having thus paid for the option, it is none of appellant's business how or from whence it gets its supply of water unless it obtains it from appellant. This construction alone saves the contract from being unnatural, and, aside from the express reservation of the right to bring in its own works of a public nature, repels the implication claimed by appellant.

Indeed, the revenue to be derived for the construction of water works for *both* the city and inhabitants under the constitution and laws could *only* be raised from sales to the inhabitants, and unless the city can thus raise it this police and sanitary power conferred upon the city will be invaded and destroyed. It cannot reasonably be claimed that it was contemplated the city would sell water to itself for its own use, and there is no other mode of raising this revenue. All this in connection with the reservation of the right to construct and maintain its own works of a public nature—*i. e.*, water works—emphatically show that it was not the intention of the city to surrender such rights, if it was at all possible for it to do so.

Commencing on page 10 and ending on page 16, elaborate quotations and citations are adduced in support of the familiar rule that the powers of a city are divided into two classes, namely, public and private; and that supplying a city with water is generally held to be of a private character.

The case of Illinois Trust & Savings Bank *vs.* Arkansas City, 78 Fed., 271, cited by counsel in their brief, pages 12 and 15, involved the construction of an express contract for the construction and maintenance of water works. As to

such contract, the court held the same rule applied as in the construction of contracts between individuals. As to that portion of ordinance No. 248 whereby the city was to be supplied for five years, the said rule would perhaps obtain. Moreover, in the Illinois case, that portion of the ordinance which granted an exclusive franchise was held void, leaving the only question to be determined that of liability for rental of water hydrants which had been installed under such grant.

But with reference to the remaining portion of the ordinance, whereby the *franchise* was granted to the Helena Consolidated Water Company, there is no doubt that it is a public grant, and in such instances the doubt, if any, is resolved in favor of the public and against the grantee. That this differentiation is well taken, we refer to the second case cited by counsel themselves, namely, Little Falls Elec. & W. Co. vs. Little Falls, 102 Fed., 662.

There the city entered into a thirty-year contract with the company for water to be furnished to the municipality, and also granted a franchise for the construction of a water and light plant. The court held the doctrine contended for by counsel as to the construction of the thirty-year contract, but expressly held against counsel's contention in construing the franchise in the following language, at the bottom of page 667:

"As to the showing to the effect that the City of Little Falls is taking steps to construct a plant for the supply of water and electric light, it appears that the complainant's franchises are not exclusive, and that there was not, as in the Walla Walla case, also cited, any contract on the part of the city that it would not, during the term for which the fran-

chises were granted, erect, maintain, or become interested in other like works."

The case of San Francisco Gas Co. *vs.* San Francisco, 9 Cal., 453, is authority for the proposition that a municipal corporation may become liable for gas on an implied contract.

The tendency of later decisions is to hold such power *public.*

"The power of supplying water by the city to its inhabitants is held in a recent New York case to be a power granted to the municipality for a *public use,* not private."

Fire Ins. Co. *vs.* Village of Keeseville, 148 N. Y., 46.

In that case the court said:

"When we find the power conferred has reference to public purposes and is for the public good, it is to be classed as governmental in its nature, and it appertains to the corporation in its political character. * * * There is nothing connected with the work which is not of a *governmental and public nature.* It is *in no sense a private business;* and the authority to construct the work was given it by the legislature, not at its own particular request or application, but because it was one of the political divisions of the State, and as such, was entitled to exercise it. No interest was designed to be subserved other than that of adding to the powers of a community carrying on a local government."

And in the brief of counsel for the electric light company in the Joplin case, in this court, this same proposition was urged and several of the same cases cited as in the case at bar.

The character of the function to be performed in the case

at bar is, truly speaking, *public*. The protection against and extinction of fires, the flushing of sewers, the enforcement of sanitary regulations, and the supplying of good, pure, wholesome, and abundant water to the inhabitants of a city, to the end that their health and daily sustenance should be preserved, and the avoidance of a water famine, are unquestionably *public* in character. And we submit that the better reasoning is in favor of the doctrine announced in 148 New York, 46, *supra*.

Considerable stress is laid on the fact that the title of ordinance No. 248 is "To provide the city of Helena and its inhabitants with a *permanent* water supply." It is said that the word "*permanent*" is significant with reference to the term of the agreement. We submit that the use of this word is in consonance with our construction of the provisions of section 26, as fully set forth in our original brief, to the effect that it was the *essence of the agreement* for the five-year period of supply, and also of the essence of granting the franchise as shown by the use of the words "acceptance thereof" (referring to the franchise), not *thereof* (the agreement), that the company should, at all times during such agreement and the term of the franchise, provide all the inhabitants of the city with a "full, ample, and sufficient supply of good, pure, wholesome and clear water," subject, of course, to the terms (*i. e.*, the rates prescribed) and conditions (if they *desired* to take it). What the city council evidently desired and intended to have understood beyond all question was that the predecessors of appellee and its successors should have a *real*, fixed, certain, and unvarying supply, as distinguished from a transitory, an uncertain, migratory affair so common in the western,

mountainous sections, where creeks are overflowing one season and dry the next.

To illustrate: Suppose that the source contemplated consisted of a creek of varying flowage, or of percolating waters flowing through gravel and drained into a well or reservoir, and thence pumped throughout the city. Unless said supply was such as to be "continuing in the same state or without any change that destroys its volume or quantity, remaining unaltered, durable, fixed, and lasting," it would not be a "permanent" supply.

The word "permanent" is defined in Webster's Unabridged Dictionary as follows: "*Continuing in the same state*, or without any change that destroys form or character; *remaining unaltered* or unremoved: abiding; durable; fixed; stable; lasting."

It is next contended (pages 8, 9) that in section 6 of the ordinance "such supply" relates solely to the *extent* of the supply and not to the time for which the supply should be furnished, notwithstanding the plain, clear, unmistakable, unambiguous, and unequivocal language there used, namely:

"Such supply shall be full, ample and sufficient for the present population of said city, and for the future population of said city as the same may be from time to time *during the full term* of five years; and said water shall be pure, wholesome, and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use."

What becomes of the language "for the full term of five years"? Is it meaningless?

Counsel next maintain, on page 21, that while its duty under its franchise to furnish water so long as it exercises

the license or permit to use the streets, "there is no duty devolving upon the water company, independent of contract, to continue the business of furnishing water; and unless complainant has contracted not to do so, it has the right to remove its pipes and mains from the streets and abandon the operation of its plant at any time," followed by a disjointed except (page 22 of brief) taken from Judge Buck's decision, contained in the transcript, page 100. This except should, we submit, in all fairness to the judge who wrote it, be given in connection with the balance of his opinion upon that particular feature.

This decision is an adjudication and furnishes a complete answer in itself to counsel's contention, just quoted, and found on pages 13, 14 and 15 of their brief. In fact, upon reading this decision (pages 199, 200, Record) it will be seen that counsel for the Helena Consolidated Water Company, predecessor in interest of complainant herein, urged the same argument that they now advance as to the *contractual obligation after the five years*, while counsel for the city took the ground which they now maintain. The court sustained the city's position, namely, that it was by reason of its *public duty* under the franchise and *not any contractual obligation* that the company was required to furnish water after its five-year contract had expired.

The next feature discussed by appellee's counsel is the Walla Walla case, extending from pages 22 to 25 of their brief. Counsel maintain that, even though the Walla Walla ordinance had not contained the express provision that the city would not install a plant of its own, "the decision would not have been different if this express provision had been omitted from the ordinance." Refraining from indul-

gence in prophecy, we will content ourselves in respect thereto, in the belief that, notwithstanding counsel's views to the contrary, the distinction urged in regard to the Walla Walla case is well taken and recognized by the many Federal decisions cited in our original brief and subsequent decisions by this honorable court.

Another and controlling distinction is that, while in the Walla Walla franchise there was an express agreement by the city that it would not install a plant of its own, here we have an express *reservation by the city of Helena* whereby it could not only grant a franchise to another company, but *an express reservation by the city of Helena itself of the right to construct its own plant.*

If " works of a public nature," when applied to an incorporated city, with power to condemn property to construct them, comprise water works, then this court is asked to leave out what has been inserted in the reservation, and insert " except water works," which has been left out, and that, too, in direct violation of the law for the construction of statutes which we have quoted, and which says the court shall not omit what is inserted or insert what is omitted. Why should this be done so as to change the whole meaning of the reservation to raise a presumption which the best-considered cases hold does not even exist without it?

Is any contract to be implied that the city would not put in its own plant during the term of appellant's franchise? The Skaneateles decision answers this in the following forcible language:

" *There is no implied contract in an ordinary grant of a franchise such as this, that the grantor will never do any act by*

which the value of the franchise may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication."

We submit that the decision of the circuit court of appeals was correct and should be affirmed.

Respectfully submitted.

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